Maybank Trustees Bhd (for and on behalf of Etiqa Insurance Bhd, formerly known as Malayan National Insurance Bhd) v Boustead Holdings Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)-51 OF 2009

ABDULL HAMID EMBONG, HASAN LAH AND SULAIMAN DAUD JJCA

29 SEPTEMBER 2009

C

Contract — Guarantee — Redeemable convertible bonds — Bond redeemable upon maturity either by recovery of redemption price or by conversion into fully paid up shares — Cash redemption notice issued by issuer — Whether conversion notice issued by holder — Refusal by issuer to allot shares to holder — Whether issuer obliged to issue shares or may simply pay redemption amount to holder — Whether redemption notice extinguished holder's right of conversion — Whether holder's right to conversion crystallised before issuer's right of redemption

D

E

Equity — Competing equities — Priority — Whether applicable — Whether doctrine of priority applicable where respective rights and obligations of parties are regulated by contract

F

Equity — Estoppel — Estoppel by conduct — Whether respondent was misled or put into position of detriment by appellant's conduct

G

The basis of the appellant's claim was a trust deed dated 21 June 2004 under which the respondent issued a seven year redeemable convertible bonds to the bondholder. The bonds were taken up by Malaysia National Insurance Bhd ('MNIB'), and the rights were now being enforced by the appellant. There were two ways in which the issued bonds could be redeemed, vis (i) upon reaching the maturity date of seven years from the issue date; or (ii) by exercising the right to optional redemption before the maturity date but after three years from the issue date. The respondent, as issuer of the bonds, could exercise its option to redeem pursuant to cl 4.2 of the trust deed. Under cl 4.2(b) the respondent was obligated to give a one-month notice to the bondholder prior to the redemption date. This 30 days interval or window period was to enable the appellant to decide whether to convert or to be paid the redemption price. Clause 5A gave the appellant the right to convert the bonds into fully paid up shares at the conversion price, of RM1.95 per share.

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A The conversion date was the date of the receipt of the conversion notice by the registrar of the respondent. On 1 October 2007 the respondent issued a redemption notice stipulating the redemption date as 1 November 2007. The appellant on the other hand, lodged a conversion notice with the registrar on 16 October 2007. The respondent however did not issue or allot the new B shares within the ten days of that conversion date, as required under cl 5A1. On 1 November 2007 the respondent instead, purported to make payment of the optional redemption price, which the appellant rejected since it had lodged a conversion notice earlier. On 5 November 2007 the respondent C issued a certificate of cancellation of the bonds, rendering them ineffective. The respondent chose to ignore the appellant's conversion notice. The appellant therefore commenced this suit for specific performance. The appellant applied for summary judgment and the respondent applied to strike out the claim. The learned judge dismissed the appellant's application and D allowed the respondent's application. The respondent claimed that there was no basis to grant specific performance as the bonds had been earlier redeemed and cancelled. The appellant claimed that the act of conversion took place on 16 October 2007. On that date the bonds had not yet been redeemed. The issue before the court was which event came first, ie the redemption by the E respondent or the conversion by the appellant. The learned trial judge answered this question in favour of the respondent by applying the priority doctrine. The respondent also raised the issue of estoppel stating that the appellant had, in their meeting prior to the issuance of the redemption F notice, agreed to the optional redemption price.

Held, allowing the appeal with costs here and below:

G (1) The trial judge referred to the doctrine of competing equities under the maxim 'qui prior est tempore, potior est jure' (ie priority is determined by the order of the creation of interests). It is an equitable rule applied to determine the ranking of competing interests. The rights of the parties in this case had to be determined on the construction of the H relevant clauses in the trust deed itself. The equitable doctrine of priority was not applicable. This was purely a case of the parties respective rights and obligations pursuant to their contract. Equity, had no part in interpreting those clauses (see paras 21 & 23).

I (2) The redemption notice had not affected or extinguished the appellant's right to convert their bonds under the trust deed. The respondent was obliged within ten days upon receipt of the conversion notice to allot and issue new ordinary shares to the appellant. Further, the trust deed made no mention of the extinguishment of the appellant's right to

convert, upon receiving the notice to redeem. Conversion thus, could take place at any time, even within the 30-day interval period (see para 26).

(3) Since the conversion took place on 16 October 2007 ie the date the appellant's notice to convert was received by the registrar, it should then have been allotted and issued with the new ordinary shares within ten market days. Thus by 1 November 2007, ie the effective redemption date, there was nothing left to be redeemed since the bonds were deemed converted into new ordinary shares. Thus, the appellant's right to conversion had crystallised first (see paras 27–28).

(4) As regards the estoppel by conduct of the appellant, there was no merit in the submission. There was neither any intention on the part of the appellant to agree to the redemption exercise, nor to influence or induce the respondent to act in any particular manner. The acceptance of the redemption notice was not meant to be a waiver on the part of the appellant. The respondent had not been misled or put into a position of detriment by the appellant's conduct, for the doctrine of estoppel to arise (see paras 34, 36 & 38).

[Bahasa Malaysia summary

Asas bagi tuntutan perayu ialah surat ikatan amanah bertarikh 21 Jun 2004 di mana responden mengeluarkan bon tujuh tahun yang boleh tukar dan tebus kepada pemegang bon. Bon-bon tersebut diambil oleh Insurans Nasional Malaysia Bhd ('INMB'), dan hak-hak tersebut kini dikuat kuasakan oleh perayu. Terdapat dua cara di mana bon yang dikeluarkan boleh ditebus iaitu (i) setelah mencapai tarikh matang tujuh tahun daripada tarikh dikeluarkan; atau (ii) dengan melaksanakan hak untuk penebusan pilihan sebelum tarikh matang tetapi selepas tiga tahun daripada tarikh dikeluarkan. Responden, pengeluar bon-bon, boleh melaksanakan pilihannya untuk menebus menurut klausa 4.2 surat ikatan amanah. Di bawah klausa 4.2(b) responden berkewajipan untuk memberikan notis sebulan kepada pemegang bon sebelum tarikh penebusan. Jarak waktu 30 hari atau 'window period' ialah untuk membolehkan perayu memutuskan sama ada untuk menukar atau membayar harga penebusan. Klausa 5A memberikan hak kepada perayu untuk menukar bon-bon kepada saham-saham yang dibayar sepenuhnya pada harga pertukaran RM1.95 se saham. Tarikh pertukaran merupakan tarikh penerimaan notis pertukaran oleh pendaftar kepada responden. Pada 1 Oktober 2007 responden mengeluarkan notis penebusan yang menetapkan tarikh penebusan sebagai 1 November 2007. Perayu sebaliknya mengemukakan notis pertukaran dengan pendaftar pada 16 Oktober 2007. Walau bagaimanapun, responden tidak mengeluarkan atau menguntukkan saham-saham baru dalam masa sepuluh hari tarikh pertukaran tersebut,

A sepertimana yang diperlukan di bawah klausa 5A1. Pada 1 November 2007 responden sebaliknya berniat untuk membuat bayaran harga penebusan pilihan yang ditolak oleh perayu memandangkan ia telah mengemukakan notis pertukaran terlebih dahulu. Pada 5 November 2007 responden mengeluarkan sijil pembatalan bon-bon tersebut, yang menyebabkannya B tidak lagi sah. Responden memilih untuk mengabaikan notis pertukaran perayu. Oleh itu perayu memulakan guaman ini untuk perlaksanaan spesifik. Perayu memohon untuk penghakiman terus dan responden memohon untuk menolak tuntutan tersebut. Hakim yang bijaksana menolak permohonan perayu dan membenarkan permohonan responden. Responden menghujah C bahawa tidak terdapat asas untuk memberikan perlaksanaan spesifik memandangkan bon-bon tersebut telah ditebus terlebih dahulu dan dibatalkan. Perayu menghujah bahawa tindakan pertukaran berlaku pada 16 Oktober 2007. Pada tarikh tersebut, bon-bon belum lagi ditebus. Isu yang dibicarakan di mahkamah ialah yang mana satu mengambil tempat terlebih D dahulu, iaitu penebusan oleh responden atau pertukaran oleh perayu. Hakim perbicaraan yang bijaksana menjawab soalan ini berpihak kepada responden dengan menggunakan doktrin prioriti. Responden yang juga mengemukakan isu estopel menyatakan bahawa perayu telah bersetuju dengan harga E penebusan pilihan dalam perjumpaan mereka sebelum notis penebusan dikeluarkan.

F **Diputuskan**, membenarkan rayuan dengan kos di mahkamah ini dan Mahkamah Tinggi:

(1) Hakim perbicaraan merujuk kepada doktrin persaingan ekuiti di bawah maksim 'qui prior est tempore, potior est jure' (iaitu prioriti ditentukan oleh kedudukan pembentukan kepentingan). Ini merupakan prinsip G ekuiti yang digunakan untuk menentukan kedudukan persaingan kepentingan. Hak-hak pihak dalam kes ini perlu ditentukan berdasarkan pembentukan kaluasa-klausa yang relevan dalam surat ikatan amanah itu sendiri. Doktrin prioriti ekuiti tidak boleh digunapakai. Ini jelas merupakan kes mengenai hak dan kewajipan H pihak-pihak menurut kontrak mereka. Ekuiti tidak terlibat dalam menterjemahkan klausa-klausa tersebut (lihat perenggan 21 & 23).

(2) Notis penebusan tersebut tidak menjejas atau menghapuskan hak perayu untuk menukar bon-bon mereka di bawah surat ikatan amanah I tersebut. Responden berkewajipan dalam masa sepuluh hari selepas penerimaan notis pertukaran tersebut untuk menguntukkan dan mengeluarkan saham-saham biasa yang baru kepada perayu. Selanjutnya, surat ikatan amanah tersebut tidak menyatakan hak perayu untuk menukar terhapus setelah menerima notis untuk menebus. Oleh

itu pertukaran boleh berlaku bila-bila masa, walaupun dalam jangka waktu 30 hari tersebut (lihat perenggan 26).

(3) Memandangkan pertukaran berlaku pada 16 Oktober 2007 iaitu tarikh notis perayu untuk menukar diterima oleh pendaftar, ia sepatutnya diuntukkan dan dikeluarkan dengan saham-saham biasa yang baru dalam masa sepuluh hari pasaran. Oleh itu melalui 1 November 2007, iaitu tarikh penebusan berkuatkuasa, tidak terdapat apa-apa untuk ditebus memandangkan bon-bon dianggap ditukar kepada saham-saham biasa yang baru. Oleh itu, hak perayu untuk menukar telah terbentuk terlebih dahulu (lihat perenggan 27–28).

(4) Merujuk kepada estopel melalui tindakan perayu, tidak terdapat merit dalam hujahan tersebut. Tiada niat bagi pihak perayu untuk bersetuju untuk perlaksanaan penebusan, atau mempengaruhi atau memujuk responden untuk bertindak dalam tindakan tertentu. Penerimaan notis penebusan bukan bermaksud penepian bagi pihak perayu. Responden tidak diperdayakan atau diletakkan dalam kedudukan yang terjejas melalui tindakan perayu untuk membolehkan doktrin estopel digunakan (lihat perenggan 34, 36 & 38).]

Notes

For a case on priority, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) para 2455.
For cases on estoppel, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2693–2713.
For cases on guarantee generally, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3809–3808.

Cases referred to

Abigail v Lapin [1934] AC 491, PC (refd)
Vallipuram Sivaguru v PCRM Palaniappa Chetty Official Administrator of the Estate of Gan Inn, deceased [1937] MLJ 59, HC (refd)
United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors [1976] 1 MLJ 169, FC (refd)
Zeno Ltd v Prefabricated Construction Co (Malaya) Ltd & Anor [1967] 2 MLJ 104, HC (refd)

Legislation referred to

Contracts Act 1950 s 53
Rules of the High Court 1980 O 18, O 18 r 19(1)(b), (d), O 81

Appeal from: Civil Suit No D8–22–1463 of 2007 (High Court, Kuala Lumpur)

Robert Lazar (Lai Wai Fong and Caryn Yu with him) (Nik Saghir & Ismail) for the appellant.

Fahri Azzat (Azzat & Izzat) for the respondent.

Abdull Hamid Embong JCA (delivering judgment of the court):

[1] In the High Court, the defendant (now respondent) had applied vide encl 13 to strike out the plaintiff's (now appellant) pleading under O 18 r 19(1)(b), (d) of the Rules of the High Court 1980 ('RHC') on the grounds that it was scandalous, vexatious and an abuse of the court's process.

[2] The appellant vide encl 15, simultaneously applied for specific performance on a summary basis pursuant to O 81 of the RHC.

[3] The basis of the appellant's claim was a trust deed dated 21 June 2004 under which the respondent issued a seven year redeemable convertible bonds to the bondholder, who subscribed some RM40m worth of bonds. The bonds were taken up by Malaysia National Insurance Bhd ('MNIB'), and the rights are now being enforced by Mayban Trustees Bhd ('the appellant'). In this judgment all clauses referred to are clauses found in the trust deed.

REDEMPTION

[4] There are two ways in which the issued bonds may be redeemed, vis:

(a) upon reaching the maturity date of seven years from the issue date ie on 19 August 2011; and

(b) by exercising the right to optional redemption before the maturity date but after three years from the issue date.

[5] Under the interpretation clause of the trust deed, the redemption date is defined such:

(i) the date fixed for redemption of such Bonds pursuant to the Redemption Notice given by the Issuer under Clause 4.2 or (ii) the Maturity Date of such Bonds, if such Bonds had not been previously redeemed, converted, purchased or cancelled in accordance with the terms herein prior to the Maturity Date;

The optional redemption price is defined such:

> the redemption sum payable by the Issuer to redeem the Bonds from the Bondholders in the event the Issuer exercises the Redemption Option, which shall be at an accreted value subject to the market price of the existing Share traded on the Bursa Malaysia being at least 130% of the Conversion Price;

[6] The respondent, as issuer of the bonds, may exercise its option to redeem pursuant to cl 4.2. The manner by which the respondent can exercise this option is by way of giving the appellant not less than 30 days notice prior to the redemption date.

[7] Clause 4.2 of the trust deed is now reproduced for easy reference:

4.2 Redemption Option:

(a) The Issuer may exercise the Redemption Option, at anytime during the Optional Redemption Period by redeeming all (but not part of) the Bonds *which have not been converted* in the accordance with Clause 5A or Condition 4A of Schedule 2 of this Deed at the Optional Redemption Price. (Emphasis added.)

(b) The Issuer shall give to the Bondholders a Redemption Notice not less than thirty (30) days prior to the Redemption Date in the manner provided in Condition 8 of Schedule 2 of this Deed subject to the closing price of the Shares as traded on Bursa Malaysia for the consecutive thirty (30) days being at least 130% of the Conversion Price. The Issuer shall set out in the Redemption Notice the date, time, place and the Optional Redemption Price of the Bonds to be redeemed.

[8] Under cl 4.2(b); the respondent is obligated to give a one-month notice to the bondholder prior to the redemption date. This 30 days interval or window period is to enable the appellant to decide whether to convert or to be paid the redemption price. Thus, during this period the position of the appellant, as the bondholder, is fluid. And the fact that a redemption notice has been given, does not extinguish the appellant's right to convert the bonds or not.

CONVERSION

[9] Clause 5A gives the appellant the right to convert the bonds into fully paid up shares at the conversion price, which as defined in cl 1 was RM1.95 per share. The conversion date is the date of the receipt of the conversion notice by the registrar of the respondent.

[10] Upon allotment and issue of the shares, the bonds so converted shall lapse and cease to be valid (see cl 5A2).

NOTICES BY BOTH PARTIES

[11] On 1 October 2007, the respondent issued a redemption notice

A stipulating the redemption date as 1 November 2007. Prior to 1 October 2007 both parties had met and agreed that the redemption sum for all the bonds subscribed by the appellants should be RM47,740,000. The appellant on the other hand, lodged a conversion notice with the registrar on 16 October 2007. The respondent however did not issue or allot the new shares B within the ten days of that conversion date, as required under cl 5A1 of the trust deed.

[12] Clause 5A1 states that upon receipt of the conversion notice, the respondent shall within ten market days of the conversion date allot and issue C the new ordinary shares.

[13] On 1 November 2007, the respondent instead, purported to make payment of the optional redemption price, which the appellant obviously rejected since it had lodged a conversion notice earlier.

D

[14] On 5 November 2007, the respondent issued a certificate of cancellation of the bonds, rendering them ineffective. In other words, the respondent chose to ignore the appellant's conversion notice.

E

[15] The appellant then took out an application for summary judgment, and the respondent responded by applying to strike out the claim.

[16] The learned judge dismissed the appellant's application for summary F judgment and allowed the respondent's application for striking out the claims.

[17] The thrust of the respondent's case was that there was no basis to grant specific performance to the appellant as the bonds had been earlier redeemed G and thus cancelled. It was also argued that once the respondent exercised their right to redeem, the appellant's right to convert the bonds is either suspended or extinguished.

[18] Learned counsel for the appellant submitted that the act of conversion H took place on 16 October 2007. On that date, the bonds had not yet been redeemed since the redemption date was fixed a month later, on 1 November 2007. He also stated that the purpose of the 30 day window period in the redemption exercise is to allow the appellant an opportunity to decide whether to convert the bonds or to allow redemption to take place. This I would be guided by market sentiment.

[19] The issue before the High Court and here, is thus to determine which event comes first, ie the redemption by the respondent or the conversion by the appellant?

[20] The learned trial judge answered this question in favour of the respondent by applying the priority doctrine. In his judgment, the learned judge made the following findings:

> As the plaintiff has the right to convert and the defendant the right to redeem, the dispute can be quite easily resolved by applying the rule of priority that governs the orderly conduct of our daily lives — a fortiori in commercial contract involving large sums of money where decisions need to be made with speed and certainty.
>
> The rule is quite well established: first in time first in right.
>
> The defendant was 'first' on the notice and the notice overrides the subsequent notice to convert given by the plaintiff. The defendant was therefore the first in time and hence the first in right.

[21] Is the doctrine of priority applicable? We think not. The doctrine applied by the learned trial judge here refers to the doctrine of competing equities under the maxim 'qui prior est tempore, potior est jure' (ie priority is determined by the order of the creation of interests). It is an equitable rule applied to determine the ranking of competing interests. Its application may be seen from some authorities on land dealings where a third party is involved in making an overlapping claim on the same interest resulting in conflicting equities between two competing parties. An instance of such conflict arises in cases of land dealings where two rival parties claim their equity under the same title as happened in the cases of *Vallipuram Sivaguru v PCRM Palaniappa Chetty Official Administrator of the Estate of Gan Inn, Deceased* [1937] MLJ 59 and *Zeno Ltd v Prefabricated Construction Co (Malaya) Ltd & Anor* [1967] 2 MLJ 104. In both cases, there arose the question of who had a better equity in the land between a lienholder and a transferee of the same land title.

[22] In the case of *United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors* [1976] 1 MLJ 169, the Federal Court applied the doctrine by citing the decision of the Privy Council in *Abigail v Lapin* [1934] AC 491, and referred to a paragraph from an Australian case stating:

> In the case of a contest between two equitable claimants, the first in time, all other things being equal, is entitled to priority.

[23] In our view, the rights of the parties in this case must be determined on the construction of the relevant clauses in the trust deed itself, in particular those express terms which we had adverted to earlier in this judgment. These terms form the basis of their agreement as regards the bonds. We thus find that the equitable doctrine of priority, not to be

A applicable. This is purely a case of the parties respective rights and obligations pursuant to their contract. Equity, in our view, plays no part in interpreting those relevant clauses.

B **[24]** In our view, the giving of an early notice for redemption does not take immediate effect but must, according to cl 4.2 of the trust deed, be deferred until the lapse of a 30 day window period. During this window period, the closing price of the shares for 30 consecutive days must be at least 130% of the conversion price. The conversion price was RM1.95 and so, the 130% works out to at least RM2.53.

C

[25] The appellant during this 30 day window period, would then be able to decide whether to convert the bonds into ordinary shares (which was what it did) prior to the expiry of that 30 day window period or to receive the
D optional redemption price at the expiry of that period. In its notice of redemption, the respondent had informed the appellant that the redemption date was fixed for 1 November 2007 ie two weeks after the conversion date.

E **[26]** It is also our finding that the redemption notice had not affected or extinguished the right of the appellant to convert their bonds under Schedule 2 of the trust deed. In fact under cl 5A1, the respondent is obliged within ten market days upon receipt of the conversion notice to allot and issue new ordinary shares to the appellant. Furthermore, the trust deed makes no
F mention of the extinguishment of the appellant's right to convert, upon receiving the notice to redeem. Conversion thus, may take place at any time, even within the 30 day interval period.

[27] Since the conversion took place on 16 October 2007 ie the date the
G appellant's notice to convert was received by the registrar, it should then have been allotted and issued with the new ordinary shares within ten market days. Thus by 1 November 2007, ie the effective redemption date, there was nothing left to be redeemed since the bonds are deemed converted into new ordinary shares.

H

[28] We thus agree with the stand taken by the appellant that their right to conversion had crystallised first.

[29] Under the terms of the trust deed, each party may exercise either
I options to redeem or to convert unilaterally and without the need for prior consent from the other party. But, to accede to the view of the respondent that once the respondent exercised its right to redeem, the appellant's right to convert is 'suspended or extinguished' would mean that the rationale of having a 30 day window period and the need to have a minimum threshold

value (at 130% of the conversion price of RM1.95) would have no purpose or effect at all. Why then have these meaningless terms inserted in the trust deed?

[30] It would also mean that the appellant's hand would be bound by the mere issue of the respondent's optional notice of redemption whereas the trust deed gives the appellant the right to convert the bonds at any time, unilaterally and without any prior notice.

ESTOPPEL

[31] The respondent also raised the issue of estoppel stating that the appellant had in, their meeting prior to the issuance of the redemption notice, agreed to the optional redemption price (amounting to RM47,740,000). It was not disputed that in that meeting the appellant was represented by one Siti Nita Zuhra Mohd Nazri. It was submitted by learned counsel of the respondent that the business efficacy must be given to that agreement by the representative of the appellant, otherwise it would promote chaos.

[32] Firstly, we say that to hold that the appellant's right to convert the bonds had crystallised first does not flout business common sense. Nor does it bring chaos to this or any similar transaction. In our view, the approach we have taken is but to give effect to the order of performance, of the parties obligations under the trust deed, which is construed in accordance with s 53 of the Contracts Act 1950, which states:

> where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

[33] The business efficacy here, we think, is that it makes more sense why the right to convert should remain unaffected during the 30 day window period before the redemption becomes effective. That this choice for a conversion remains open to the appellant even during the window period can be seen in this commentary on 'investors option' found in the seventh edition of the *Handbook of Fixed Income Securities* by Frank J Fabozzi, which says this:

> Conversion Option
>
> When a convert is redeemed by the issuer, it loses the conversion privilege on the last day of the redemption notice period, which is generally 15 to 30 calendar days following the redemption notice, with 30 days the norm. Most often redemption is intended to force the convert into equity. For this to occur, the convert should be in-the-money when the investor turns in the bond. And this raises the question of when during the 30-day period should the investor tender the bond for

conversion. Following the redemption notice, if the stock price falls below the effective per share redemption price, the investor can choose to receive the redemption price. Thus the redemption notice triggers a put, with maturity equal to the number of days in the redemption notice period, during which time the investor has the right to tender the convert and receive the redemption price. As is well known, all long positions in American options have nonnegative value. Consequently, under normal circumstances, they should not be exercised prematurely. The investor should wait to exercise either option until the moment before the expiration of the redemption period.

[34] As regards the estoppel by conduct of the appellant, we find that there is no merit in this submission. We are satisfied that there was neither any intention on the part of the appellant to agree to the redemption exercise, nor to influence or induce the respondent to act in any particular manner.

[35] Learned counsel for the respondent in his submission had referred to Siti Nita Zuhra's affidavit in reply for the appellant, in particular to para 21.3. The whole of that said para 21 is now reproduced to appreciate the proper context of that reply in the face of the respondent's assertion that the appellant's right to conversion is extinguished or suspended in view of Siti Nita Zuhra's agreement to the redemption notice.

[36] Paragraph 21 of the said affidavit states:

21. With reference to paragraphs 8 to 8.2 of the Defendant's Affidavit, I disagree with the inference drawn by the Defendant as set out therein. In reply, I state as follows:

21.1 Under clause 4.2C of the Trust Deed, on the Redemption Date, in this case 1st November 2007, the Optional Redemption Price together with any outstanding Coupons and other payments due under the Trust Deed shall be paid to the Bondholders in accordance with Depository Procedures.

21.2 Under 1.1 of the Trust Deed, the Optional Redemption Price shall be 'at an accreted value subject to the market price of the existing shares traded on the Bursa Malaysia being at least 130% of the Conversion Price'. The Trust Deed does not provide for the method to ascertain the 'accreted value' referred to in the Trust Deed.

21.3 In the circumstances, it was necessary for MNIB and the Defendant to ascertain and agree on the 'accreted value' and consequently, the Optional Redemption Price. Since the documentation does not provide a formula for calculating the

quantum, it was necessary for me to then discuss with the Defendant's representative and calculate and to arrive at what would be a mutually acceptable Optional Redemption Price. That was all that was done. Certainly there was no waiver of the right of MNIB to convert the RC Bonds.

21.4 MNIB and the Defendant did ascertain and agree on the accreted value and consequently, the Optional Redemption Price. The Optional Redemption Price was calculated based on a yield to market rate of 3.90% and coupon rate of 4.5%.

21.5 Thus, my acknowledgement and agreement to the Redemption Notice is limited to what has been set out above. It is not a waiver of the Plaintiff's right to convert the RC Bonds.

It is clear from paras 21.3 and 21.5 above that the acceptance of the redemption notice is not meant to be a waiver on the part of the appellant.

[37] Furthermore, and as already stated the trust deed itself does not mention the need for any consent for a redemption notice to be issued. It may be unilaterally exercised by the respondent. Nor is there any term in it to say that, even if there was an agreement for its issue, that the appellant's right to convert the bonds is extinguished.

[38] The evidence does not show that the respondent had been misled or put into a position of detriment by the conduct of the appellant, for the doctrine of estoppels to arise.

[39] Learned counsel in his concluding speech to us said this:

The issuer (respondent) here in effect is borrowing money and agrees to pay a fixed rate of interest for a seven year period. The issuer only has the right to opt for early redemption after three years. The issuer cannot compel the bondholder (the appellant) to take up the shares. By exercising early redemption the Issuer deprives the Bondholder of further interest payments. However during the window period (ie the 30 day interval) the closing price of the shares must be at least at the minimum threshold share value that is 130% of the conversion price (the conversion price in this case was RM1.95 so 130% will be at least RM2,535). This requirement is to enable the issuer (by way of the issuance of the redemption notice) to force the bondholder to decide within the window period (who is potentially going to be deprived of future interest payments) whether to convert the bonds into ordinary shares prior to the expiry of the window period or to receive the optional redemption price at the expiry of the window period.

[40] We agree and adopt the same as our conclusion.

[41] For these reasons, we allowed this appeal with costs here and below. We also allowed the appellant's application for summary judgment at encl 15 and for damages to be assessed by the registrar. The order of the High Court dated 24 November 2008 is set aside.

Appeal allowed with costs here and below.

Reported by Kanesh Sundrum